

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

DOMINIC ANTONUCCI

08-CV-529 (SAS)

Petitioner

V.

04 CR-828 (SAS)

UNITED STATES OF AMERICA,

Respondent

O R D E R

AND NOW, this day of , 2008,

having considered Petitioner's Motion for Leave to File a Reply to the Government's
Opposition to his Motion Under 28 U.S.C. Section 2255 on or before June 5, 2008, it is
hereby ORDERED that Petitioner's Motion is GRANTED.

Dated:

J.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

DOMINIC ANTONUCCI

08-CV-529 (SAS)

Petitioner

VI.

04 CR-828 (SAS)

UNITED STATES OF AMERICA,

Respondent

MOTION FOR LEAVE TO FILE REPLY TO GOVERNMENT'S
OPPOSITION TO PETITIONER'S MOTION UNDER
28 U.S.C. SECTION 2255 ON OR BEFORE JUNE 5, 2008

Petitioner, Dominic Antonucci, by and through his attorney, hereby moves this Honorable Court for leave to file a Reply to the Government's Opposition to his Motion Under 28 U.S.C. Section 2255 for the reason set forth above.

(1) The Government's Opposition contains an affidavit from Attorney Carl F. Schoeppl, (Exhibit F) and from Attorney Charles A. Ross (Exhibit G). The affidavits make factual averments about conversations between prior counsel and Mr. Antonucci. Present counsel for Mr. Antonucci cannot respond to the Government's Exhibits F and G without consulting with Mr. Antonucci. He is incarcerated and will require an opportunity to

receive the Government's Opposition by mail and communicate with present counsel in writing.

(2) Sworn statements made by any attorney including the defense attorneys or AUSAs are entitled to no weight whatsoever when making the decision to grant or deny an evidentiary hearing. *Machibroda vs. United States*, 368 U.S. 487, 493-97, 82 S.Ct. 510, 7 L.Ed.2d 473 (1962)[AUSA's sworn statements cannot defeat right to evidentiary hearing], *United States vs. White*, 366 F3d 291, 300 (4th Cir. 2004)[AUSA's unsworn statements are not evidence], *United States vs. Kelly*, 790 F2d 130 (DC Cir. 1986)[unsworn statements by AUSA may not be used as substitute for an evidentiary hearing in connection with a post conviction motion], *Taylor vs. United States*, 487 F2d 307 (2d Cir. 1973)[Sworn statements of an AUSA cannot defeat the movant's right to a hearing in connection with a post conviction motion.] *Bender vs. United States*, 387 F2d 628, 630 (1st Cir. 1967)[Sworn statement from attorney cannot defeat right to an evidentiary hearing], *Lindhorst vs. United States*, 585 F2d 361, 365 (8th Cir. 1978), *Brown vs. Johnson*, 224 F3d 461 (5th Cir. 2000).

(3) Mr. Antonucci should have the right to review and respond to the affidavits submitted by the Government. Allowing Mr. Antonucci to respond to the affidavits submitted by the Government in its Opposition will assist the court in narrowing the issues for an evidentiary hearing.

WHEREFORE, Petitioner moves this Honorable Court for leave to file a reply to the Government's Opposition to his Motion Under 28 U.S.C. Section 2255 on or before June 5, 2008.

Dated: May 5, 2008

Respectfully submitted,

/s/Cheryl J. Sturm
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CERTIFICATE OF SERVICE

The undersigned certifies that on the 5th day of May, 2008 she caused a copy of the within motion to be served upon opposing counsel by United States Mail, first class postage pre-paid and addressed as follows:

Michael J. Garcia, AUSA
U.S. Attorney's Office
Southern District of New York
One St. Andrew's Plaza
New York, New York 10007

Dated: May 5, 2008

/s/Cheryl J. Sturm